PD-0972-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 11/30/2017 8:43 AM
Accepted 11/30/2017 2:25 PM
DEANA WILLIAMSON
CLERK

FILED
COURT OF CRIMINAL APPEALS
11/30/2017
DEANA WILLIAMSON, CLERK

No. PD-0972-17
In the
Texas Court of Criminal Appeals
At Austin

◆

No. 01-15-01089-CR
In the Court of Appeals for the
First District of Texas
at Houston

◆

JASON RAMJATTANSINGH
Appellant
V.
THE STATE OF TEXAS
Appellee

◆

STATE'S BRIEF ON DISCRETIONARY REVIEW

◆

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ORAL ARGUMENT PERMITTED

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below.

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Trial Judge:

Honorable Shelly Hancock, Visiting Judge County Criminal Court at Law No. 8

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT REGARDING ORAL ARGUMENT

This Court has permitted oral argument in this case.

STATEMENT OF THE CASE

The appellant was charged by information with driving while intoxicated, and having a breath alcohol concentration of at least 0.15 at the time of analysis and at or near the time of the commission of this offense (CR—6). The jury found the appellant guilty as charged in the information (CR—74-75). The trial court assessed punishment at one year in county jail, suspended the appellant's sentence, and placed him on community supervision for 18 months (CR—74). The appellant filed notice of appeal and the trial court certified that he had a right to appeal (CR—62, 81).

STATEMENT OF THE PROCEDURAL HISTORY

On August 10, 2017, a panel of the First Court of Appeals issued a published opinion reversing the conviction, finding the evidence was insufficient to prove Class A misdemeanor driving while intoxicated by having an alcohol concentration of at least a 0.15. *See Ramjattansingh v. State*, No. 01-15-01089-CR, 2017 WL 3429944 (Tex. App.—Houston [1st Dist.] Aug. 10, 2017, pet. granted) (not yet released for publication). The opinion was authored by Justice Brown, and joined

by Justices Higley and Bland. *Id.* The State's petition for discretionary review was timely filed. *See* TEX. R. APP. P. 68.2(a). This Court granted review.

ISSUES PRESENTED

1. Does the filing of a charging instrument containing non-statutory language prohibit the appellate court from considering the hypothetically correct jury charge in a sufficiency review?

2. Did the First Court of Appeals sit as a thirteenth juror when holding that a two-hour interval between the time of the stop and the breath test was not sufficient to prove the appellant's breath alcohol concentration was a 0.15 near the time of the offense?

STATEMENT OF FACTS

On April 9, 2015, Jason Wilson, a wrecker driver, called 911 to report a drunk driver at 9:32 p.m. *See* (St. Ex. #1). Wilson reported that the appellant, driving a red Nissan, was swerving "all over the road" and almost caused several accidents (3 RR 225). *See* (St. Ex. #1). The appellant and Wilson were outside their vehicles when officers arrived (2 RR 171, 204).

Officers observed the appellant sway when standing, noticed he was not able to stand up straight, had slurred speech, had difficulty answering the officer's questions, and detected a strong odor of alcohol on his breath (2 RR 171, 204, 241; 3 RR 29, 241). The appellant admitted to police that he began drinking "shots" of tequila around 5:00 p.m. that day (2 RR 241-2). *See* (St. Ex. #4).

The appellant exhibited signs of intoxication on the standardized field sobriety tests (2 RR 243, 274-8). *See* (St. Ex. #4). Based on her observations, the arresting officer concluded that the appellant was intoxicated and transported him to Central Intoxication, where he was administered the breath test (3 RR 18, 20, 62, 70). The appellant's breath test results showed that the appellant had a breath alcohol concentration (BAC) of 0.235 and 0.220 at 11:28 p.m. (3 RR 123). *See* (St. Ex. #7).

At trial, the State's expert, Carly Bishop, opined that the average person would have to drink 11 shots to produce a result of a 0.220 on a breath test and that such an individual would have lost the normal use of his physical or mental faculties (3 RR 123-24). But, based on the limited information provided, Bishop could not extrapolate to the appellant's BAC at the time of driving and she admitted that it was possible the appellant could have taken all the shots immediately before getting behind the wheel, causing his BAC to be rising at the time of driving (3 RR 124-29).

SUMMARY OF THE ARGUMENT

The court of appeals improperly found that he State was estopped from asserting the hypothetically correct jury charge standard for purposes of sufficiency review when non-statutory elements were pled in the indictment—whether intentional or accidental. Regardless, reviewing the sufficiency of the

evidence as pled, the court of appeals improperly sat as the thirteenth juror, usurping the jury's role to define terms and evaluate the evidence.

FIRST ISSUE PRESENTED

Does the filing of a charging instrument containing non-statutory language prohibit an appellate court from considering the hypothetically correct jury charge in a sufficiency review?

No. Sufficiency review is not altered based on what is contained in the State's charging instrument. Rather, the question is whether the essential elements of the offense are proven beyond a reasonable doubt after viewing the evidence in a light most favorable to the verdict. *Jackson v. Virginia*, 443 U.S. 307, 318–19 (1979). This Court has repeatedly held that the essential elements of the offense are "the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997); *Hernandez v. State*, PD-1049-16, 2017 WL 4675371, *2-4 (Tex. Crim. App. Oct. 18, 2017) (not yet released for publication). And this systemic requirement is not subject to estoppel.

The First Court of Appeals found that although ordinarily the sufficiency of the evidence must be measured under a hypothetically correct jury charge rather than the charge given, here, the State invited error through its pleadings. *Ramjattansingh v. State*, No. 01-15-01089-CR, 2017 WL 3429944, *3 (Tex. App.—Houston [1st Dist.] Aug. 10, 2017, pet. granted) (not yet released for publication).

The court of appeals held that because the State added non-statutory language in its pleading it was estopped from using the hypothetically correct jury charge standard in a sufficiency review. *See id*. This decision is in direct conflict with this Court's precedent considering a hypothetically correct jury charge despite variances from statutory language. *See Malik*, 953 S.W.2d at 240.

Section 49.04 of the Texas Penal Code provides that a driver commits the Class B misdemeanor offense of driving while intoxicated if he operates a motor vehicle in a public place while intoxicated. *See* TEX. PENAL CODE § 49.04(a) (West 2015); TEX. PENAL CODE § 49.04(b) (West 2015). If the proof at trial shows that an analysis of a person's blood, breath or urine showed an alcohol concentration of 0.15 or more at the time the analysis was performed, the offense is a Class A misdemeanor. *See* TEX. PENAL CODE § 49.04(d) (West 2015).

In the present case, the State charged the appellant by information with Class A misdemeanor driving while intoxicated by having an alcohol concentration of 0.15 or more (CR—6). *See* TEX. PENAL CODE § 49.04(d) (West 2015). The State alleged that the appellant unlawfully operated a motor vehicle in a public place while intoxicated and further alleged that "at the time of the analysis and at or near the time of the commission of the offense, an analysis of the [appellant's] [breath] showed an alcohol concentration level of at least 0.15." (CR—6). Thus, in addition to the statutory language in Section 49.04(d), the

State included the phrase "at or near the time of the commission of the offense" (CR—6). The jury charge tracked the language of the indictment without objection from either party (CR—63-7; 3 RR 181).

On appeal, the appellant challenged the sufficiency of the evidence. *See* (App'nt Original Brf. to First Court of Appeals pp. 6-13). Specifically, he claimed that the evidence was insufficient to show that the appellant had an alcohol concentration of at least 0.15 at the time of the offense. *See* (App'nt Original Brf. to First Court of Appeals pp. 6-13).[1]

This Court has held for decades[2] that sufficiency of the evidence should be measured against elements of the offense as defined by the hypothetically correct jury charge for the case. *Malik*, 953 S.W.2d at 240*Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011); *Fuller v. State*, 73 S.W.3d 250, 252 (Tex. Crim. App. 2002); *Gollihar v. State*, 46 S.W.3d 243, 253 (Tex. Crim. App. 2001); *Hernandez*, 2017 WL 4675371 at *2-4. That is, "one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or

[1] The appellant did not dispute that the evidence was sufficient to support the underlying Class B misdemeanor driving while intoxicated, and he did not address whether the evidence was sufficient to show his BAC was at least a 0.15 *near* the commission of the offense. *See* (App'nt Original Brf. to First Court of Appeals pp. 6-13).

[2] This standard has been in effect since this Court's decision in *Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997).

unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Malik*, 953 S.W.2d at 240.

Since *Malik*, the hypothetically correct jury charge analysis is a systemic requirement for a sufficiency review. In *Gollihar*, this Court held that a hypothetically correct jury charge "need not incorporate allegations that give rise to immaterial variances." *Gollihar*, 46 S.W.3d at 256. This Court determined that "when faced with a sufficiency of the evidence claim based upon a variance between the indictment and the proof, only a material variance will render the evidence insufficient." *Id.* at 257 (internal quotations omitted). A variance is material only if it prejudices the defendant's substantial rights. *Id.*; *Hernandez*, 2017 WL 4675371 at *2-4 (explaining the difference between a material variance and an immaterial variance) (citing *Johnson v. State*, 364 S.W.3d 292, 299 (Tex. Crim. App. 2012)).

In determining whether a defendant's substantial rights have been prejudiced, two questions are asked:

> [W]hether the indictment informed the defendant of the charge against him sufficiently to allow him to prepare an adequate defense at trial, and whether prosecution under the deficiently drafted indictment would subject the defendant to the risk of being prosecuted later for the same crime.

Id. at 258.

Variances involving immaterial, non-statutory allegations do not render the evidence legally insufficient. *Johnson*, 364 S.W.3d at 299 (noting that a variance between the manner and means in which murder may be alleged to have been committed and proven would not constitute a material variance); *see also Gollihar*, 46 S.W.3d at 257 (overruling the surplusage rule, whereby descriptive averments of statutory elements must always be proven as alleged, and holding that "[a]llegations giving rise to immaterial variances may be disregarded in the hypothetically correct [jury] charge" envisioned in *Malik*). And this Court has held that the only allegations which are material are "those descriptive averments of statutory elements that define[ ] or help[ ] define the allowable unit of prosecution." *Cornwell v. State*, 471 S.W.3d 458, 467 (Tex. Crim. App. 2015) (quoting *Johnson*, 364 S.W.3d at 297-99).

Here, the additional, non-statutory phrase "at or near the time of the offense" fits the test for an immaterial, non-fatal variance. *Cf. Cornwell*, 471 S.W.3d at 465-67 (finding additional non-statutory phrase "by trying to resolve pending criminal case" included in the indictment not material to prove impersonating a peace officer; rejecting that it was elemental—that the State needed to prove; holding evidence sufficient under hypothetically correct jury charge deleting such language); *Gollihar*, 46 S.W.3d at 257 (finding no material variance when indictment included model number of item stolen and evidence proved different

model); *see also Hernandez*, 2017 WL 4675371 at *4 (finding no material variance when a different manner and means of committing the assault was proven at trial; "the fact that appellant caused [victim] to suffer bodily injury with his hands not by striking her with them, but instead by choking her, does not make the aggravated assault that was proved at trial different than the aggravated assault that was pled in the indictment.").

The phrase is not an element of the offense, is not a descriptive averment of the statutory elements, and the language could have been deleted or abandoned without having affected the charged offense and without prejudicing the appellant's substantial rights. *See Cornwell*, 471 S.W.3d at 467; *see also Gollihar*, 46 S.W.3d at 257, n. 21 ("If the allegation is one which would be considered 'surplusage' in that it is not essential to constitute the offense and might be entirely omitted without affecting the charge against the defendant, and without detriment to the indictment, then it would rarely meet the test of materiality."). Whether this would then bring a notice issue is a separate concern that this Court has declined to address in a sufficiency analysis. *See, e.g., Cornwell*, 471 S.W.3d at 467, n. 8 (citing *Johnson*, 364 S.W.3d at 299). Accordingly, the non-statutory phrase should not be incorporated into a sufficiency review under a hypothetically correct jury charge.

Contrary to this Court's precedent, the First Court of Appeals held that *Malik* did not apply in the present case because the additional language included in the State's charging instrument invited error. *See Ramjattansingh*, 2017 WL 3429944 at *3. The court found that the State affirmatively created an additional burden by the chosen pleading and thus, the State was estopped from utilizing the hypothetically correct jury charge in reviewing the sufficiency of the evidence. *See id*. But, as previously stated, this is contrary to this Court's precedent and the essence of sufficiency review. *See, e.g., Cornwell*, 471 S.W.3d at 465-67 (rejecting appellant's argument that State needed to prove non-statutory phrase included in indictment on sufficiency review; holding evidence sufficient under hypothetically correct jury charge deleting such language); *Hernandez*, 2017 WL 4675371 at *2-4 (applying hypothetically correct jury charge in sufficiency review).

This Court recently rejected a similar argument in *Cornwell*. *See Cornwell*, 471 S.W.3d at 465-67. Cornwell was charged with impersonating a peace officer and the indictment included the language required by the statute along with the non-statutory phrase "by trying to resolve a criminal case." *See id*.[3] Cornwell argued that because the State pled this additional language it was required to prove it and that

[3] *See id*. at 466 n. 6 ("It alleged that Appellant 'impersonate[d] a public servant, namely: Assistant District Attorney with Dallas County, Texas, with the intent to induce Kourtney Teaff, an Assistant District Attorney with Montgomery County, Texas, to submit to the pretended authority or rely on the pretended officials acts of the defendant by trying to resolve a pending criminal case.'"); *see also* TEX. PENAL CODE § 37.11 (West 2015).

the evidence presented was insufficient to do so. *See id*. In rejecting that argument, this Court determined that the phrase was not an element of impersonating a peace officer and stated, "we do not hesitate to conclude that it should not be incorporated into the hypothetically correct jury charge against which to measure sufficiency of the evidence." *Id*. at 466-67 (internal quotes omitted) (quoting *Gollihar*, 46 S.W.3d at 257). And, as previously noted, the additional phrase here is similar additional, non-elemental language that should not be included in the hypothetically correct jury charge.

Reviewing a similar issue involving the State adding the same phrase "at or near the time of the commission of the offense" to the pleading for Class A misdemeanor driving while intoxicated, the Fourteenth Court of Appeals applied *Malik* in a sufficiency analysis and found the evidence sufficient under a hypothetically correct jury charge. *Leonard v. State*, 14-15-00560-CR, 2016 WL 5342776, at *2-3 (Tex. App.—Houston [14th Dist.] Sept. 22, 2016, pet. ref'd) (mem. op., not designated for publication) (determining sufficient evidence for Class A driving while intoxicated because the evidence showed the alcohol concentration of more than 0.15 at the time of analysis despite the additional language in the charging instrument). The Fourteenth Court of Appeals rejected Leonard's argument that the State failed to prove his breath alcohol concentration level was at least a 0.15 "at or near the time of the commission of the offense," finding that

under the hypothetically correct jury charge the State was not required to prove the non-statutory language. *Id.* at *3. Thus, the Fourteenth Court of Appeals' decision falls in line with this Court's precedent and is in direct conflict with the First Court of Appeals' decision regarding sufficiency.[4]

Additionally, the inclusion of non-statutory language or surplusage in a charging instrument is not an "act" for purposes of the invited error doctrine. The invited error doctrine estops a party from making an appellate error of an action it induced. *Prytash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999). The doctrine applies when the complaining party on appeal was the reason for the error it complains of. *See id*; *Cary v. State*, 507 S.W.3d 750, 755 (Tex. Crim. App. 2016). But here, no action was induced by the State. *Cf. Cary*, 507 S.W.3d at 755 (declining to apply invited error to a sufficiency analysis with no evidence of an inducing action). This is not a situation where the State acted affirmatively to induce the trial court to do something in the charging instrument and now is complaining about it on appeal. The appellant is complaining of error on appeal regarding the sufficiency of the evidence; the State is attempting to affirm the judgment of the

[4] The Fourteenth Court of Appeals did, however, apply the invited error doctrine to Leonard's claim of jury charge error, a separate issue raised before the court. *See Leonard*, 2016 WL5342776 at *5-6. In *Leonard*, there was a lengthy discussion regarding the court's charge and ultimately the State agreed to the defendant's proposal; thus, the court of appeals held that Leonard could not later complain about the charge on appeal that he requested, appropriately applying the invited error doctrine. *See id*. Here, the appellant does not raise any complaints regarding jury charge error regarding this additional language.

trial court. And, as previously stated, the only issue is whether a rational jury could have found each essential element of the offense beyond a reasonable doubt. *Id.* (citing *Jackson*, 443 U.S. at 318-19).

The court of appeals relied on its own decision in *Meza v. State*, 497 S.W.3d 574 (Tex. App.—Houston [1st Dist.] 2016, no pet.), but the facts of *Meza* illustrate why invited error does not apply to this case. In *Meza*, during the charge conference, the trial court pointed to similar surplusage in the jury charge that was not required by statute and asked the State if they wanted to abandon the language. *Meza*, 497 S.W.3d at 580. The prosecutor specifically declined to do so. *See id.* Although *Meza* did not address the invited error doctrine, it illustrates an affirmative act by the State "inviting error" into the jury charge. *See id.*[5] Whereas, here, other than including surplusage in the pleading, no such affirmative action or statement was made by the State. Nothing in this record supports the court of appeals' contention that the State intentionally invited error.[6] Thus, the First Court of Appeals held, for the first time, that merely including non-statutory language in a pleading—regardless if included intentionally or by a mistake—

[5] It is unclear why the First Court of Appeals did not apply the hypothetically correct jury charge in *Meza*, but that issue is not raised before this Court and, as noted, the case was decided on different facts. *See Meza*, 497 S.W.3d at 580-87.

[6] The court of appeals contends that the additional language in the charging instrument a "deliberate decision [by the State] to increase its burden," but nothing in *this* record supports that contention. *See Ramjattansingh*, 2017 WL 3429944 at *3; *cf. Meza*, 497 S.W.3d at 580-86.

estops the State from relying on a hypothetically correct jury charge for sufficiency purposes. *See Ramjattansingh*, 2017 WL 3429944 at *3. Accordingly, the First Court of Appeals' decision is contrary to this Court's precedent and in effect eviscerates the hypothetically correct jury charge from sufficiency review.

The appellant argues that this case is about invited error; that by pleading the additional phrase "at or near the time of the offense" the State intentionally increased its burden and the sufficiency review should incorporate this phrase as an element of the offense. (App'nt Original Brf. to First Court of Appeals pp. 6-13; App'nt Reply to State's PDR pp. 2-5). But, as previously stated, that is in direct conflict with *Malik* and its progeny.

The appellant's argument hinges on facts from a separate case and asks this Court to look outside *this* record to find that the State invited error in *this* case. Specifically, the appellant points to comments from the prosecutor in *Meza* regarding a "department policy" of the District Attorney's Office "not to abandon surplusage language after trial has begun" and argues that it is proof that the state invited error in *this* case. *Meza*, 497 S.W.3d at 580. But even if the prosecutor's comment in *Meza* expounded an actual official policy of the District Attorney's Office, that does not equate to invited error in *this* case.[7] Without evidence in *this*

[7] First, office policies can change and change often. *Meza* was tried in October 2015 in Harris County Criminal Court at Law Number 5 and the appellant's case was tried two months later in

record one way or the other, this Court should not speculate as to what the District Attorney's Office policy was.

Moreover, the appellant cites no authority that allows an appellate court to take judicial notice of comments made by a party in a reporter's record from a separate case in order to find invited error in the present case. Contrary to the appellant's argument, courts generally lack the power to take judicial notice of records or documents in another cause. *Turner v. State*, 733 S.W.2d 218, 222 (Tex. Crim. App. 1987); *see also Garza v. State*, 996 S.W.2d 276, 279–80 (Tex. App.—Dallas 1999, pet. ref'd) (noting assertions made by an individual, even under oath, are not the type of facts that courts take judicial notice of under Rule 201(b)).

Regardless, whatever policy may or may not have been in place, it does not override *Malik* and sufficiency review under the hypothetically correct jury charge. Estoppel should not be applied to sufficiency review, especially in this case where the claim derives merely from what was pled in the indictment.

In the present case, the record reflects that the State introduced sufficient evidence to support appellant's conviction under a hypothetically correct jury charge. Under a hypothetically correct jury charge, the non-statutory language should have been omitted. *See, e.g.*, *Leonard*, 2016 WL5342776 at *3; *Cornwell*, 471

December 2015 in Harris County Criminal Court at Law Number 8; thus, it is possible any supposed policy could have changed by the time of the appellant's trial. Second, it is possible the policy did not apply across the board to all departments. Nevertheless, it is speculative to infer an office policy applied in this case on this silent record.

S.W.3d at 467. Alternatively, the State's conjunctive pleading would not have prevented a disjunctive charge. *See Cada v. State*, 334 S.W.3d 766, 771 (Tex. Crim. App. 2011) ("It is well established that State may plead in the conjunctive and charge in the disjunctive."); *Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Crim. App. 1991) ("It is settled that 'when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, … the verdict stands if the evidence is sufficient with respect to any of the acts charged.'"). The jury could have been charged in the disjunctive, changing the "and" prior to the additional language to an "or" in a hypothetically correct jury charge.[8] *See id.* The record reflects that the appellant's BAC was at least a 0.220 within two hours of the stop. *See* (St. Ex. #7). Thus, the evidence was sufficient to show that the appellant's BAC was at least a 0.15 at the time of analysis.

The court of appeals' holding, at its very essence, requires the State to prove a non-existent offense, which was exactly the reason why the hypothetically correct jury charge became part of the sufficiency review, rejecting prior decisions measuring sufficiency by the charge given. The court of appeals improperly applied the invited error doctrine to a systemic requirement for sufficiency review. Moreover, this case creates precedent for finding that any mistake in the charging

[8] Thus, the charge would have read in relevant part: "and you further find that an analysis of the Defendant's breath showed an alcohol concentration of at least .15 at the time of the analysis, *or* at or near the time of the commission of the offense, then you will find the Defendant guilty." *See* (CR—63) (emphasis added).

instrument estops the State and prevents a court from using the hypothetically correct jury charge on a sufficiency review. Accordingly, this Court should reverse the Court of Appeals' judgment on this issue.

SECOND ISSUE PRESENTED

Did the First Court of Appeals sit as a thirteenth juror when holding that a two-hour interval between the time of the stop and the breath test was not sufficient to prove the appellant's breath alcohol concentration was a 0.15 near the time of the offense?

Even if sufficiency is reviewed under the actual jury charge given, rather than the hypothetically correct jury charge, the State introduced sufficient evidence to support the appellant's conviction. The First Court of Appeals held that a two-hour interval from the time of the stop and the time of the breath test was not close enough in time to be considered *near* the time of the offense. *Ramjattansingh*, 2017 WL 3429944 at *4. But in reaching this conclusion the court of appeals incorrectly sat as the thirteenth juror and inserted its own evaluation of the evidence, usurping the jury's evaluation of the same evidence. *See id.*

When reviewing sufficiency of the evidence, a reviewing court shall view all of the evidence in the light most favorable to the verdict and determine, based on that evidence and any reasonable inferences therefrom, whether any rational fact finder could have found the elements of the offense beyond a reasonable doubt. *Gear v. State*, 340 S.W.3d 743, 746 (Tex. Crim. App. 2011) (citing *Jackson*, 443 U.S. at

318–19). An appellate court does not sit as thirteenth juror and may not substitute its own judgment for that of the fact finder by re-evaluating weight and credibility of the evidence. *Isassi v. State*, 330 S.W.3d 633, 638 (Tex. Crim. App. 2010). Rather, the reviewing court should defer to the responsibility of the fact finder to fairly resolve conflicts in testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Id.* A reviewing court's duty is to ensure the evidence presented actually supports a conclusion that the defendant committed the crime. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007).

The evidence was sufficient under the charge given to the jury. The State was required to prove that the appellant drove while intoxicated and that his breath alcohol concentration (BAC) was at least 0.15 "at the time of analysis and ***at or near*** the time of the commission of the offense" (CR—6, 62-4) (emphasis added). Thus, the State could have proven the charged offense through either theory—*at* the time of the offense *or near* the time of the offense. *See* (CR—6, 63-64). *See Leza v. State*, 351 S.W.3d 344, 357 (Tex. Crim. App. 2011) (noting a jury returns a general verdict and the evidence is sufficient to support a guilty finding under any of the allegations submitted, the verdict should be upheld).

The evidence proved beyond a reasonable doubt that the appellant had a BAC above a 0.15 *near* the time of the offense.[9] There is no dispute that the appellant was seen driving around 9:30 p.m. and that around 11:30 p.m. the breath test was administered, showing the appellant's BAC was a 0.220, almost three times the legal limit (2 RR 203-4, 217; 3 RR 122). *See* (St. Ex. #1, 4, 7). Therefore, the appellant's BAC was over a 0.15 within two-hours of driving.

The term "near" is not defined by statute and jurors were free to assign it its plain and ordinary meaning. *Clinton v. State*, 354 S.W.3d 795, 800 (Tex. Crim. App. 2011). As the court of appeals pointed out, Webster's defines "near" as "a relatively short distance in space, time, degree." *Ramjattansingh*, 2017 WL 3429944 at *4 (citing Webster's New World College Dictionary 976 (5th ed. 2014)). It is reasonable to conclude that two hours is a short distance in time, or otherwise *near* the time of the offense.

No extrapolation evidence is needed to prove the term near; rather, similar to the statutory language "at the time of analysis," if the driver's BAC was a 0.15 or higher at a time near the commission of the offense, that is all that was required to be shown. *See* (CR—6). Thus, the jury could have reasonably concluded that the State sufficiently proved the appellant's BAC was at least a 0.15 within a relatively

[9] The record reflects that the State could not extrapolate in order to prove the appellant's BAC at the time of driving (3 RR 166-67, 202).

short distance in time from the offense. *See Clinton*, 354 S.W.3d at 800 ("When analyzing the sufficiency of the evidence, undefined statutory terms 'are to be understood as ordinary usage allows, and jurors may thus freely read statutory language to have any meaning which is acceptable in common parlance.'").

Rather than viewing the evidence in the light most favorable to the verdict, the court of appeals, however, inserted its own opinion that a two-hour interval from the time of driving to the time the breath test was administered was "not close enough in time to an alleged instance of drunk driving to qualify as *near* the time of the offense." *Ramjattansingh*, 2017 WL 3429944 at *4 (emphasis in original). The court based this decision on its own opinion of an analysis of a person's alcohol concentration. This was inappropriate and stands in the face of years of precedent from this Court. *See, e.g., Adelman v. State*, 828 S.W.2d 418, 423 (Tex. Crim. App. 1992) ("The lower court should not have substituted its opinion of the credibility of the witnesses and the weight to be given their testimony for that of the trier of fact. Although some hypothetical, rational trier of fact could have accepted the appellant's defense in this case, another trier of fact could have rejected that defense beyond a reasonable doubt and such finding would be legally sufficient to support the conviction."); *Johnson v. State*, 509 S.W.3d 320, 323 (Tex. Crim. App. 2017) (reversing court of appeals decision on sufficiency to show deadly weapon used when court of appeals relied on its own interpretation of the

security video, although witness testified to the contrary; finding evidence factfinder could have rationally concluded that the knife was exhibited and used in commission of the offense; thus, sufficient).

The record reflects that the jury took their charge seriously, weighing the evidence and finding it sufficient to support the offense charged. The record reflects that the jury looked at the scene video and the 911 call during deliberations, asking specifically to "see the time" stamps (3 RR 205). *See* (St. Ex. #1, 4). This was not a runaway jury that an appellate court needed to step in and rectify. Rather, the court of appeals inappropriately usurped the jury's right to interpret the word "near," an undefined term, in its plain meaning and imposed its own restrictive definition. *Cf. Gross v. State*, 380 S.W.3d 181, 188 (Tex. Crim. App. 2012) (reversing, for insufficient evidence, appellant's murder conviction as a party to murder when nothing beyond mere speculation supported the State's theory).

The court of appeals' decision only focused on whether the evidence was sufficient to prove that the appellant's BAC was above a 0.15 ***at*** the time of the offense, which was only one alternative manner and means of the State's allegation (CR—6) (emphasis added). It appears from the analysis that the court of appeals was concerned with the inability to extrapolate the appellant's BAC to at the time he was driving (or when the offense occurred). *See Ramjattansingh*, 2017 WL 3429944 at *4. The court points to the State's expert's testimony that it was

possible for a person's alcohol concentration to rise rapidly if he drinks a large amount of alcohol in a short amount of time and that the appellant's BAC could have been "below .08 when he was on the road." *See id*. But, as previously stated, the State did not need to extrapolate to the exact time of the offense; instead, the jury could have rationally concluded that the two hour time frame was sufficient to show that the appellant's BAC was above a 0.15 *near* the time of the offense. (CR—6, 63-4).[10]

In reaching its conclusion, the court of appeals picked apart the evidence, focusing only on the conflicting evidence in the record—that it was *possible* for a person's alcohol concentration to rise rapidly if he drinks a large amount of alcohol in a short amount of time. *See Ramjattansingh*, 2017 WL 3429944 at *4. But, as previously stated, the record reflects other evidence the jury could have considered in finding the appellant guilty of the charged offense.

The appellant admitted to officers that he had been drinking shots since about 5:00 p.m. (2 RR 241-42). *See* (St. Ex. #1, 4). He was seen driving and stopped by police around 9:30 p.m. (2 RR 217). *See* (St. Ex. #1, 4). The officers testified the appellant's speech was slurred, there was a strong odor of alcohol on his breath, he could not maintain his balance, and showed signs of intoxication during the field

[10] The State was required to prove that the appellant's BAC was at least 0.15 "at the time of analysis and *at* ***or*** *near* the time of the commission of the offense" (CR—6, 62-4) (emphasis added). Thus, the State could have proven the charged offense through either theory.

sobriety tests (2 RR 204, 241-50; 3 RR 19). And Bishop testified that for someone to have the BAC of a 0.22 it would take on average 11 shots (3 RR 123-24). There was no evidence presented that the appellant rapidly consumed any amount of alcohol after being stopped and there was no evidence of any alcohol found in his vehicle. Thus, based on the evidence presented, contrary to the court of appeals' finding, the jury could have reasonably rejected the contention that the appellant rapidly consumed a large amount of alcohol prior to the stop.

Moreover, the record reflects that the officers conducted their tests and investigation in about as quickly a manner as possible without jeopardizing results. This was not a situation where the breath test or blood was taken so many hours or days later that it could not be related to the time of driving.

Furthermore, it appears that the court of appeals would require a *de facto* rule that no defendant could ever be convicted of Class A misdemeanor DWI without retrograde-extrapolation evidence. But that stands contrary to this Court's prior holdings that BAC results, even absent retrograde extrapolation, are highly probative to prove intoxication. *See, e.g., Kirsch v. State*, 306 S.W.3d 738, 745 (Tex. Crim. App. 2010); *Stewart v. State*, 129 S.W.3d 93 (Tex. Crim. App. 2004); *see also Kuciemba v. State*, 310 S.W.3d 460, 463 (Tex. Crim. App. 2010) (noting that the defendant's high blood-alcohol concentration, determined from a blood sample drawn shortly after the defendant's one vehicle, rollover crash, "supports an

inference either that [the defendant] was recently involved in the accident or that he had been intoxicated for quite a while[,]" which, along with other evidence of intoxication, supported the defendant's DWI conviction).

Reviewing the record in the light most favorable to the jury's verdict, there was sufficient evidence presented for a rational trier of fact to have concluded beyond a reasonable doubt that the appellant was guilty of Class A misdemeanor driving while intoxicated with a BAC of 0.15 or higher. *Powell v. State*, 194 S.W.3d 503, 508 (Tex. Crim. App. 2006); *Jackson*, 443 U.S. at 319. Thus, even under the charge actually given, the court of appeals' judgment should be reversed on this issue and the conviction for Class A misdemeanor driving while intoxicated affirmed. Because the First Court of Appeals usurped the jury's role to reasonably define an undefined term, this case could serve an important precedent as a reminder that appellate courts do not sit as the thirteenth juror.

CONCLUSION

It is respectfully requested that the Court of Appeals' judgment on this issue be reversed, the sufficiency of Class A misdemeanor of driving while intoxicated by 0.15 or higher be affirmed, and the case remanded to address the appellant's remaining issues.

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